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BEFORE THE  
STATE WATER RESOURCES CONTROL BOARD

THE CITIES OF BELLFLOWER, BURBANK, CERRITOS, COMMERCE, DIAMOND BAR, DOWNEY, IRWINDALE, LA-CANADA FLINTRIDGE, LA MIRADA, LA VERNE, LAKEWOOD, LAWNSDALE, MONROVIA, PALOS VERDES ESTATES, PICO RIVERA, POMONA, RANCHO PALOS VERDES, SANTA FE SPRINGS, SIGNAL HILL, SOUTH GATE, VERNON, WALNUT, AND WHITTIER, et al., municipal corporations; and THE BUILDING INDUSTRY ASSOCIATION OF SOUTHERN CALIFORNIA, a Non-Profit Mutual Benefit Corporation, and THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, a Non-Profit Mutual Benefit Corporation, AND

THE CITY OF ARCADIA, a municipal corporation AND

WESTERN STATES PETROLEUM ASSOCIATION , a Trade Association  
Petitioners,

v.

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, LOS ANGELES REGION, and DENNIS DICKERSON, Executive Officer, Los Angeles Regional Water Quality Control Board.

Respondents,

File Nos.: A-1280; A-1280(a); A-1280 (b)

**POST-HEARING BRIEF**

**July 7, 2000**

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1  
2 **INTRODUCTION**

3           The State Board conducted a two-day hearing in the matter on June 7 and June 8. The  
4 State Board, in a letter dated June 12, requested the parties to the Petition to submit a Post-  
5 hearing Brief addressing four questions by July 7. The Los Angeles Regional Board's response  
6 follows.

7 **RESPONSE TO QUESTIONS**  
8

9 **I. If There Is To Be A Numeric Design Standard For Infiltration Or Treatment, Is The 0.75-Inch**  
10 **Standard Appropriate? Should It Be Substituted With A Different Numeric Standard, Including**  
11 **Potentially Different Numbers for Different Areas? If There Were A Range Of Numbers How**  
12 **Would They Be Implemented?**

13           A. Numerical Design Criteria and Storm Water Quality

14           A numeric design standard is the most elementary criterion necessary to ensure that post  
15 construction BMPs for new development and significant redevelopment are sized to reduce  
16 pollutants in storm water runoff to the statutory standard of MEP. The next step would be to  
17 relate treatment or infiltration volume to pollutant removal capabilities based on a technology or  
18 performance standard. As presented in the Regional Board's oral testimony on June 8, other  
19 jurisdictions have already taken this step by establishing performance standards for total  
20 suspended solids, zinc, nitrogen and phosphorous<sup>1</sup>. The third step would be to relate the BMP  
21 performance standard to receiving water objectives and beneficial uses. For example, the  
22 Province of Ontario, Canada, specifies total suspended solids removal standards based on fish  
23 habitat protection guidelines.<sup>2</sup> The Los Angeles Regional Board's action is at best a first step.

24           B. The 0.75 Inch And the Other Three Numeric Design Criteria are Appropriate

25           From a regulator's view point, the ideal numerical criteria to ensure that the MEP  
26 standard is met for storm water discharges should have the following characteristics. The criteria  
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<sup>1</sup> See Slide No. 6 of Dr. Swamikannu's presentation and the Transcript of the June 7 Hearing. Refer also to Statements of Policy provided by Maryland, Washington and Florida contained in the record for the Hearing.

<sup>2</sup> See, *Best Practice Environmental Guidelines for Urban Stormwater*, Cooperative Research Center for Catchment Hydrology, Melbourne, Australia (1997). The document includes a comprehensive review of criteria for storm water treatment including methods in North America.

1 must be, (i) simple to use, (ii) practical and cost effective, (iii) prescriptive, (iv) flexible, and (v)  
2 scientific and technically defensible.<sup>3</sup> The criteria must also encourage innovation.

3 The Regional Board's four methods to determine the appropriate water quality design  
4 criteria for post-construction BMPs, including the 0.75-inch rainfall treatment criterion, are  
5 simple to use. They are cost-effective because the volume of rainfall or runoff to be treated is  
6 based on the water quality efficient (maximized) volume or precipitation event. The methods are  
7 also prescriptive and thus easy to follow in contrast to the Petitioners empty alternative.<sup>4</sup> Three of  
8 the four design criteria provide the opportunity for site flexibility. All four design criteria produce  
9 values for storm water treatment that are similar (not surprising because the Los Angeles area is  
10 highly paved).<sup>5</sup> Finally, the Regional Board has soundly documented and justified the technical  
11 and scientific basis for the numerical water quality design criteria in the record and in oral  
12 testimony before the State Board.<sup>6</sup> In addition, the choice of design standards presented will  
13 promote BMP design innovation.

### 14 C. The Numeric Design Criteria – Different Numbers For Different Areas

15 The numerical criteria provided by the Regional Board already provides Petitioners the  
16 opportunity to account for differences in site conditions such as rainfall patterns and percent  
17 surface area imperviousness. In fact, the ASCE Method (maximized volume treatment) and the  
18 California Handbook Method (annual percent volume treatment) both calculate the runoff volume  
19 (a direct measure) to be treated to remove pollutants rather than rainfall volume (an indirect  
20 measure). Thus, if an MS4 Permittee wants to use an area sensitive method, all the permittee  
21 needs to do is select either one of these methods and obtain a site-specific or area specific value  
22 (greater than or less than the 0.75-inch design standard). The claim made by Petitioners that the  
23 design criterion is “one size fits all” is ingenuous, because only the 0.75-inch standard is  
24 numerically prescriptive. The rationale to listing the 0.75-inch standard is to provide the simplest  
25 choice of criterion that is also readily understandable. A single determinate value promotes  
26 countywide certainty and consistency for the development community. However, the 0.75-inch  
27 standard is not the sole BMP design criterion provided by the Regional Board. Three other

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28 <sup>3</sup> Some of these factors must be balanced against each other. For e.g., the simpler an approach the less rigorously scientific it is.

29 <sup>4</sup> Permittees did propose a 0.6-inch design criteria in an early draft. However, admittedly that the number was selected arbitrarily.

30 <sup>5</sup> See Regional Board's calculations for the required retention basin volume using the four methods. The values are within ten percent  
31 of one another. AR 9(18)

32 <sup>6</sup> See the Record of Decision and Staff Report at 2 [AR 2(2)] and Dr. Swamikannu's June 8 testimony Slides 1 – 5 for the scientific  
33 basis; AR 14(3) for the mathematical calculations; and our May 5 Response in Opposition to Petition at 31 for a legal analysis.

1 derivative design criteria based on long-term precipitation records or rainfall runoff patterns are  
2 also provided.

3 D. Numerical Design Criteria Implemented As a Range of Numbers

4 As discussed earlier, three of the four methods for determining the water quality design  
5 criteria already allow for the option of area specific numerical values that are different from the  
6 0.75 inch standard. In theory, the Los Angeles County MS4 program could have at least 86  
7 different design standard values based on the number of municipal jurisdictions. The Los  
8 Angeles County MS4 permit allows for such differences, regardless of the merits of having so  
9 many numbers, which might be a compliance nightmare for the development community.<sup>7</sup> A  
10 SUSMP that differs from the Regional Board approved SUSMP only by a numerical value that is  
11 different than the 0.75 inch, but derived using one of the other three accepted design criteria  
12 methods, would be ruled not only as being substantially similar but also of being functionally  
13 identical. If an MS4 Permittee uses this option, the Regional Board will review the calculations  
14 and accept the functionally identical design numerical value for inclusion in guidelines and in  
15 technical manuals.

16 **II. What Types Of Redevelopment Or Remodeling Projects Should Be Included Within The  
17 Mitigation Requirements?**

18 A. Significance of Redevelopment and Remodeling

19 Petitioners have argued that the current definition of “redevelopment” is confusing and  
20 may be too broad and burdensome if literally applied.<sup>8</sup> They claim that a single-family  
21 homeowner making interior remodeling changes or replacing a roof would be required to install  
22 treatment control BMPs. The Regional Board did not intend for the rule to apply to internal  
23 remodeling projects or limited external work such as roof replacements. The current definition of  
24 “redevelopment” in the SUSMP, is largely a result of the Regional Board’s efforts to incorporate  
25 clarifying text proposed by Permittees.<sup>9</sup>

26 In order to determine which categories of redevelopment or remodeling projects should  
27 be subject to the SUSMP requirements, the Regional Board reviewed the rule implementation in  
28 other leading jurisdictions. Washington, Maryland and Florida apply the requirement to control

<sup>7</sup> Board Order No. 96-054 at 34. “develop a program on planning control measures consistent with [SUSMP]....[S]hall initiate implementation...following approval of the model [SUSMP]”

<sup>8</sup> The source of the definition is the “State of Washington, Vol. 1 – Minimum Technical Requirements” , May 31 Evidence and Exhibit Supplement at 20.

<sup>9</sup> See comment letters from the Executive Advisory Committee [AR 6(10)] Los Angeles County [AR 2(16)]. Permittees recommended that the definition include the phrase “the addition, to an already developed site, of 50 percent or more impervious area or improvements to 50 percent or more of the existing improvements on site”.

1 storm water pollution from redevelopment projects to all categories of urban development based  
2 on a minimum threshold of impervious area addition, not just specific types of development.<sup>10</sup>  
3 After all, when the pollutants created by urbanization have the potential to adversely impact  
4 receiving waters, restricting the application of the rule to too few project categories might defeat  
5 the important objective of reversing the adverse impacts of past urban development practices.  
6 The application of SUSMP requirements to redevelopment projects offers the singular  
7 opportunity to regulators, not only to hold the line on water pollution from storm water  
8 discharges, but also to cost effectively reverse the adverse impacts on water quality of past  
9 urbanization.

### 9 B. Definition of Redevelopment

10 The Regional Board proposes the following definition of “redevelopment” to clear up  
11 any ambiguity of the kind suggested by Petitioners. “Redevelopment” means:  
12 “On an already developed site, the creation or addition of 5,000 square feet or more of impervious surfaces.  
13 If the creation or addition of impervious surfaces is fifty percent or more than the existing impervious  
14 surface area, then storm water runoff from the entire area (existing and additions) must be considered for  
15 purposes of storm water mitigation. If the creation or addition is less than fifty percent of the existing  
16 impervious area, then storm water runoff from only the addition area needs mitigation. Redevelopment  
17 includes, but is not limited to: the expansion of a building footprint or addition or replacement of a  
18 structure; structural development including an increase in gross floor area and/ or exterior construction or  
19 remodeling; replacement of impervious surface that is not part of a routine maintenance activity; and land  
20 disturbing activities related with structural or impervious surfaces”.

### 20 C. Types of Redevelopment Projects to Be Included

21 The Los Angeles Regional Board’s application of SUSMP requirements to  
22 redevelopment projects is limited in scope, unlike the other leading jurisdictions. It applies to  
23 only nine specific categories of redevelopment projects<sup>11</sup> and only as follows: for, (a) exterior  
24 surfaces or foundation, removal and replacement which results in the creation or addition of 5,000  
25 square feet or more of impervious surfaces (except projects in environmentally sensitive areas  
26 where the creation or addition must exceed 1,250 square feet),<sup>12</sup> and (b) other impervious

26 <sup>10</sup> See statements of policy submitted by, E. Livingston, Florida Department of Environmental Protection (May 31, 2000) at p 2; E.  
27 O’Brien, Washington Department of Ecology (May 25, 2000) at p 4; and B. Clevanger, Maryland Department of the Environment  
(May 31, 2000) at 5, May 31 Evidence and Exhibit Supplement

<sup>11</sup> See Standard Urban Storm Water Mitigation Plan at 3. AR 14(1).

<sup>12</sup> See *Infra* at 25 for CEQA rule on redevelopment threshold

1 surfaces, the removal down to bare soil or base course and replacement, which results in the  
2 creation or addition of 5,000 square feet or more of impervious surfaces (except projects in  
3 environmentally sensitive areas where the creation or addition must exceed 1,250 square feet).

4 **III. Should Location Such As Environmentally Sensitive Areas Be A Factor in Determining the**  
5 **Application of the SUSMP? If So, What Specific Types Of Projects Should Be Included?**

6 A. The Significance of Location

7 The location of new development and redevelopment projects in “environmentally  
8 sensitive areas” may demand that special requirements be imposed. The purpose of such  
9 requirements is to ensure that unique characteristics of project siting be considered in mitigating  
10 potential adverse impacts. The USEPA, in discussing storm water controls, notes: “Sensitive area  
11 protection is an important element of conservation design...These areas are particularly  
12 susceptible to degradation by storm water runoff.”<sup>13</sup> There are two main reasons why the  
13 application of requirements for new development and redevelopment should apply to projects  
14 situated in “environmentally sensitive areas.”

15 First, the geographic location of a development project can impact an ecologically fragile  
16 area. A sensitive habitat has a much lower capacity to withstand pollutant shocks than might be  
17 acceptable in the general circumstance, and so deserves special attention. The California Public  
18 Resources Code (CPRC) § 30240 (b) conditions the siting of developments in areas adjacent to  
19 “environmentally sensitive areas” to prevent adverse impacts.<sup>14</sup> Similarly, the California  
20 Environmental Quality Act (CEQA)<sup>15</sup> excludes from its categorical rule exemption, those projects  
21 situated in “environmentally sensitive areas”.<sup>16</sup> In essence, a project that is ordinarily  
22 insignificant in its impact on the environment may in a particularly sensitive environment be  
23 significant.<sup>17</sup>

24 Further, the State Board sees fit to designate by the location of discharge ‘Areas of  
25 Special Biological Significance’ (ASBS) to protect natural water conditions and prohibit waste  
26 discharges unless the State Board finds that there would be “no adverse impacts to beneficial  
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29 <sup>13</sup> See the USEPA Report “Preliminary Data Summary of Urban Storm Water Best Management Practices” EPA No. 821-R-99-012  
(1999) at 5-40.

30 <sup>14</sup> Public Resources Code § 30240(b) states, “Development in areas adjacent to environmentally sensitive habitat areas shall be sited  
and designed to prevent impacts which would significantly degrade those areas...”

31 <sup>15</sup> CEQA is an environmental statute that requires public agencies to fully consider the potential environmental impact of projects prior  
to approval.

32 <sup>16</sup> See CPRC § 21000.

33 <sup>17</sup> 19 CCR 15300.2. This sub-section lists location in an environmentally sensitive area as an exception to categorical exemptions  
determined by the Secretary for Resources. Categorical exemptions are deemed to not have a significant effect on the environment.

1 uses.”<sup>18</sup> The State Board here accepts a shifting of the burden to itself to make the affirmative  
2 determination rather than allow permissive action by default because of discharge location.

3 Examples from other jurisdictions abound. The State of Washington implements a  
4 procedural variation of the ASBS, where it requires “a use authorization” for storm water  
5 discharges potentially impacting public aquatic lands.<sup>19</sup> Florida imposes more stringent  
6 conditions for storm water treatment on new development and redevelopment projects based on  
7 the discharge location.<sup>20</sup>

8 The Los Angeles Regional Board’s application of SUSMP requirements to projects in  
9 “environmentally sensitive areas” is another basic first step. The rule merely applies requirements  
10 based on location rather than imposes more stringent criteria. The consideration by the Regional  
11 Board of location of projects for the SUSMP requirements to apply is not new, nor without  
12 precedent.

13 Second, an environmental agency such as the Regional Board has a co-stewardship  
14 responsibility, when implementing water quality regulations, to ensure that its actions are in  
15 harmony with overlapping environmental mandates for other state and federal resource  
16 conservation agencies.<sup>21</sup> The Regional Board, in part, elected to apply SUSMP requirements to  
17 projects in environmentally sensitive areas to complement implementation rather than jeopardize  
18 or harm the environmental mandates of other State or federal agencies.<sup>22</sup>

#### 16 B. The Definition of Environmentally Sensitive Areas

17 The SUSMP cross-references the applicability of SUSMP requirements to “environmentally  
18 sensitive area” to designations by other public agencies with designation powers, such as the State Board  
19 and the California Resources Agency, not itself. CPRC § 30107.5 defines an “environmentally  
20 sensitive area” as: “an area in which plant or animal life or their habitats are either rare or  
21 especially valuable because of their special nature or role in an ecosystem and which would be  
22 easily disturbed or degraded by human activities and developments.” The SUSMP requirements  
23 apply to development and redevelopment projects, which are “located in, discharging directly to, or  
24 adjacent to an environmentally sensitive area.”

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25 <sup>18</sup> See California Ocean Plan and Regional Board Basin Plan at 5-1. AR 10(17)

26 <sup>19</sup> The State of Washington under the use authorization may require, “...application of more stringent requirements that [it] determines  
are necessary to meet statutory obligations to protect the quality of the state’s aquatic lands” See *supra* at 8.

27 <sup>20</sup> The State of Florida raises the storm water treatment performance standard for new developments to 95% for direct discharges to  
Outstanding Florida Waters from 85% percent for other waters. Florida, Urban Stormwater Program, Policy Statement and AR. 11(1)

28 <sup>21</sup> Such agencies include, the California Coastal Commission, the California Department of Fish and Game, the U.S. Fish and Wildlife  
Service, and the U.S. National Oceanographic and Administrative Service to name a few.

29 <sup>22</sup> See Staff Report and Record of Decision at 11 (January 18, 2000) AR 2(2) , for a fuller discussion.

1 For the record, the Regional Board proposes to clarify two areas of this definition that  
2 may be subject to some ambiguity. These are, (i) the meaning of the phrase “directly adjacent”,  
3 and (ii) the phrase “directly discharging to.” “Directly adjacent” means situated within 200 feet  
4 of the contiguous zone required for the continued maintenance, function, and structural stability  
5 of the environmentally sensitive area.<sup>23</sup> “Directly discharging to” means outflow from a drainage  
6 conveyance system that is composed entirely or predominantly of flows from the subject  
7 property, development, subdivision or industrial facility, and not commingled with the flows from  
8 adjacent lands.

### 8 C. Specific Types of Project to be Included

9 The SUSMP does not explicitly identify which categories of projects in environmentally  
10 sensitive areas are subject to its requirements. The Regional Board’s original intent was to  
11 provide municipalities with some discretion as to which categories to include or exclude. One  
12 may reasonably exempt a few select categories of development based on the rationale that the  
13 SUSMP requirements may impose undue burden or that the category of projects have  
14 insignificant impact.

14 Rather than list the types of categories that might be included under the SUSMP  
15 requirements, as implied in the question, the Regional Board would support either: (i) the  
16 exclusion of a few specific project categories, or (ii) the establishment of a lower threshold than  
17 the general rule. The project categories or the threshold may be selected based on the legal  
18 principle that statutes [regulations and permit conditions] which are *pari materia* should be read  
19 [and interpreted] together and harmonized where possible (*NRDC v. Arcata*, 59 Cal.App. 3d  
20 959(1976)).<sup>24</sup>

20 We note that CEQA exempts from its requirements projects located in environmentally  
21 sensitive areas, if additions to existing structures are less than 2,500 square feet.<sup>25</sup> We propose  
22 the following as the determinative threshold for SUSMP requirements to apply in  
23 “environmentally sensitive areas” for new development and redevelopment projects irrespective  
24 of project category: “for projects in, directly adjacent to, or discharging directly to an  
25 environmentally sensitive area, the addition or creation of 2,500 square feet or more of

<sup>23</sup> For a discussion on minimum dimensions to protect aquatic resources, see, “The Architecture of Stream Buffers”, T. Schuler,  
25 (1995), Watershed Protection Techniques Vol. 1(4).

<sup>24</sup> The *Arcata* Court ruled that timber harvesting activities regulated by the Forest Practice Act of 1972 were also subject to CEQA,  
26 where the Forest Practice Act was silent on the matter, because it involved “Discretionary” action by a public official.

<sup>25</sup> 19 CCR 15301. In part this section categorically exempts from CEQA requirements projects in environmentally sensitive areas if  
27 “the addition will not result in an increase in more than, (1) 50 percent of the floor area of the structures before the addition or 2,500  
28 square feet whichever is less;” If the project is not in an environmentally sensitive area, the exemption threshold is 10,000 square feet.  
29 CEQA also categorically exempts single family residences, small apartments and duplexes, and small commercial structures  
30 developments in areas not designated environmentally sensitive.

1 impervious area. For redevelopment projects, the addition of impervious area must be more than  
2 1,250 square feet.”

3 **IV. Should the SUSMP Apply to Both Discretionary Projects and Ministerial Projects? How Should**  
4 **the Term Discretionary Be Defined?**

5 A. Discretionary Projects vs. Ministerial Projects

6 In CEQA, a “Discretionary Project” is one which requires the exercise of judgement or  
7 deliberation when the public agency or body decides to approve or disapprove a particular  
8 activity, as distinguished from situations where the public agency or body merely has to  
9 determine whether there has been conformity with applicable statutes, ordinances, or regulations.  
10 A “Ministerial Project” is a one where a governmental decision involves little or no personal  
11 judgement by the public official as to the wisdom or manner of carrying out the project. The  
12 public official merely applies the law to the facts as presented but uses no special discretion or  
13 judgement in reaching a decision.<sup>26</sup>

13 B. Interpretation of the Term Discretionary

14 Petitioners have argued that the application of SUSMP requirements is limited to  
15 “Discretionary” projects because the ‘enumerated categories’ appear in Board Order No. 96-054  
16 in a subsection qualified by the term “discretionary projects.” However, the term “Discretionary”  
17 is not defined in the permit. A definition is included in the SUSMP but the term “Discretionary  
18 Projects” was deleted from the main body of text. The Regional Board elected to interpret  
19 application of the SUSMP requirements in the broadest possible manner.<sup>27</sup> New development  
20 storm water controls for projects in “enumerated categories” should not be limited by the  
21 condition of “Discretionary”.

22 A review of an interpretation by the California Supreme Court of the term  
23 “Discretionary” clearly establishes that it must be read principally on policy considerations  
24 relevant to the governmental entity having jurisdiction rather than through a plain semantic  
25 inquiry. [*Lipman v. Brisbane Elementary Sch. Dist.*, 55 Cal.2d. 224 (1961); *Johnson v.*  
*California*, 69 Cal.2d. 782 (1968)]<sup>28</sup> Further, where the nature of a development project involves  
26 both ‘Ministerial’ and “Discretionary” aspects, courts have held that the rule application should

26 <sup>26</sup> The environmental application of the term “Discretionary” derives from a California Supreme Court ruling in *Johnson v. State of California*, 69 Cal.2d. 782 (1968) where the court ruled that a basic policy decision is considered “Discretionary” and thus subject to immunity from civil action, but not ministerial actions which must face case-by-case adjudication. CEQA guidelines adopt the court interpretations of the two terms.

27 <sup>27</sup> Regional Board Response to Petition at 25 discusses the Board rationale in more detail.

28 <sup>28</sup> In these cases, the California Supreme Court rejected a pure mechanical analysis of the term “discretionary” and relied greatly on the policy considerations relevant to the purposes of the governmental action in ruling on the merits of the claim.

1 be interpreted to “afford the fullest possible protection to the environment”[*People v. Dept. of*  
2 *Housing and Community Development*, 45 Cal.App.3d 185 (1975); *Day v. City of Glendale*, 51  
3 Cal. App. 3d 817 (1975)]<sup>29</sup>. The Regional Board is thus on firm ground when it adopted SUSMP  
4 requirements to apply to all development and redevelopment projects in ‘enumerated categories’  
5 irrespective of whether they are considered ‘Discretionary’ or ‘Ministerial’ in a municipal  
6 jurisdiction.

7 C. The Relevance of the Term Discretionary

8 The definition of “Discretionary” as it is applied in development planning is derived from  
9 CEQA. However, whether a project is “Discretionary” or “Ministerial” under CEQA should have  
10 little bearing on the Regional Board’s ability to subject it to storm water control requirements for  
11 new development and significant redevelopment. This is especially true where the origin of the  
12 definition in environmental regulation affords municipalities a procedure to limit public review of  
13 the potential environmental significance of the action.<sup>30</sup>

14 In essence, a strict application of the term under CEQA would allow one municipality to  
15 consider a SUSMP project category “Discretionary” while in another municipality it may be  
16 deemed “Ministerial” because of a municipality preferences and idiosyncrasies. A “Ministerial”  
17 project will escape SUSMP requirements if applicability is limited to projects considered  
18 “Discretionary.” Also under CEQA, similar projects within a municipality may be subject to  
19 different treatment depending on designation as “Ministerial” or “Discretionary” on the basis of  
20 subtle differences in project characteristics or zoning considerations.<sup>31</sup> Clearly, the Regional  
21 Board did not intend for different standards to govern different municipalities or even different  
22 standards for similar projects within the same municipality. The determinative consideration for  
23 the application of SUSMP requirements should be whether a particular category of development  
24 has been determined to cause or contribute to significant pollution of storm water. These  
25 categories should be required to implement post-construction BMPs to mitigate storm water  
26 pollution.<sup>32</sup> The classification under CEQA should not be the determining factor.

27 <sup>29</sup> In these cases, the Appellate Courts ruled that environmental statutes and regulations should be interpreted to afford the maximum  
28 protection to the environment within the reasonable scope of statutory language.

29 <sup>30</sup> In *Day v. Glendale*, 51 Cal.App.3d. 877 (1975), the court ruled that projects not explicitly identified as “Ministerial” in CEQA  
30 cannot be considered exempt if they contained some elements that are “Discretionary”. Quoting the court, “[to do so] would eviscerate  
31 CEQA, a result clearly not intended by the Legislature”.

32 <sup>31</sup> For example in the City of Santa Monica, a restaurant development would be considered “Discretionary” under CEQA only if it  
33 served alcohol. A gas station development would be considered “Ministerial” if it is not adjacent to a residential zone [personal  
34 communication by Mr. P. Foley, Planning Department, City of Santa Monica, 06/26/2000]. The sale of alcohol at a restaurant or the  
35 proximity of a gas station to homes has little or no relevance to its impact on storm water quality.

36 <sup>32</sup> The Staff Report and Record of Decision at 11-12 discusses the rationale for these categories to be included. AR 3(7).

1           D. Application to New Development and Redevelopment Projects

2           The Regional Board proposes that the definition of “Discretionary Projects” be deleted  
3 from the SUSMP section on ‘Definitions’ since the term no longer has any significance and does  
4 not appear in the main body of text.<sup>33</sup> However, if it is found necessary to define the term  
5 “Discretionary Project” because it appears in the Los Angeles County MS4 permit, then the  
6 Regional Board proposes the following definition:

7           “Discretionary Project” means a project, other than a project which is in a category enumerated  
8 by the Regional Board or State Board, and which requires the exercise of judgement or  
9 deliberation when the public agency or public body decides to approve or disapprove a particular  
10 activity, as distinguished from situations where the public agency or body merely has to  
11 determine whether there has been conformity with applicable statutes, ordinances, or  
12 regulations.”

11           **CONCLUSION**

12  
13           Numerical design criteria for treatment BMPs are indispensable, if the Regional Board is  
14 to ensure that storm water controls at new development and redevelopment are being  
15 implemented “to reduce pollutants to the maximum extent practicable.” The choice of design  
16 criteria provided by the Regional Board offers municipalities the opportunity to set a design  
17 standard that may be different from the 0.75-inch standard, when area conditions substantially  
18 differ. The Regional Board supports, “the addition or creation of 5,000 square feet of impervious  
19 area or more” in eight of the nine SUSMP categories, as the threshold for SUSMP requirements  
20 to apply for redevelopment and remodeling projects, the exception being projects in  
21 environmentally sensitive areas. Location of projects should be an important factor in  
22 determining the applicability of SUSMP requirements. Consistent with thresholds under CEQA,  
23 the Regional Board recommends that the addition or creation of 2,500 square feet or more of  
24 impervious surfaces to be considered the minimum threshold for projects in environmentally  
25 sensitive areas to be subject to the SUSMP requirements. Finally, the SUSMP requirements  
26 should apply to all projects in “enumerated categories” not just projects considered  
27 “Discretionary” under CEQA. For these reasons, the State Board must uphold the actions of the  
28 Regional Board in adopting the SUSMP and the requirements therein.

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30  
31  
32  
33 See SUSMP, AR 14(1)